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Confederate Colville Tribes v. Walton (Colville Tribes)

Hedden-Nicely

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10-1-1982

# Excerpt of final argument

Wayne C. Lenhart  
*Court Reporter*

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1 IN THE DISTRICT COURT OF THE UNITED STATES  
2 FOR THE EASTERN DISTRICT OF WASHINGTON  
3

4 COLVILLE CONFEDERATED TRIBES, )  
5 Plaintiff, )  
6 v )  
7 BOYD WALTON, JR., et ux., )  
8 et al., )  
9 Defendants. )

No. C-3421

10 CONSOLIDATED WITH

11 UNITED STATES OF AMERICA, )  
12 Plaintiff, )  
13 v )  
14 WILLIAM B. WALTON, et ux., )  
15 et al., )  
16 Defendants. )

No. C-3831

FILED IN THE  
U. S. DISTRICT COURT  
Eastern District of Washington

OCT 12 1982

J. R. FALLQUIST, Clerk  
..... Deputy

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18 EXCERPT OF FINAL ARGUMENT  
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25 Spokane, October 1, 1982 - Honorable Robert J. McNichols

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2 THE COURT: All right, Mr. Price, thank you.

3 MR. MACK: Your Honor, --

4 THE COURT: Yes, sir.

5 MR. MACK: -- there were two areas of issues  
6 raised in memorandums and the proposed findings and con-  
7 clusions filed with the Court that raised what the State  
8 believes to be statewide, not just No Name Creek Valley  
9 implications, and we also have state law implications,  
10 and on those the State would like today to give its views  
11 to Your Honor for just a few minutes.

12 THE COURT: All right.

13 MR. VEEDER: I object to it. I object to it  
14 all the way. There is not a thing in the world about  
15 anything but No Name Creek and Omak Creek and we, deadly  
16 enemy to the Indians is the State of Washington, and I  
17 object to their argument, I object to their presence here.

18 THE COURT: All right, your objection is on  
19 the record, Mr. Veeder. If the State of Washington has  
20 an interest here and wants to present it, I'm going to  
21 listen to it.

22 MR. MACK: Thank you.

23 MR. VEEDER: I would like to have just a moment  
24 of justice, I swear.

25 THE COURT: Well, we will give you a moment

1 in a moment.

2 MR. VEEDER: A very short moment.

3 THE COURT: Mr. Veeder, --

4 MR. VEEDER: Yes, sir.

5 THE COURT: If you would just relax, you will  
6 be able to make your presentation. Eventually I'm going  
7 to have to make the best decision I can make in this case.  
8 I might be right, I might be wrong, I might be part right  
9 or part wrong, but I don't think it's helpful to express  
10 your disgruntlement and to disrupt the proceedings and --

11 MR. VEEDER: By an interloper?

12 THE COURT: I know how you feel about this case,  
13 it's very obvious; I know how the other parties feel,  
14 but let's just relax and talk about the evidence. If  
15 the State of Washington, the Attorney General of the State  
16 of Washington comes in and thinks there is something that  
17 this Court should be aware of -- whether it should or  
18 should not is another question, but I'm going to give  
19 him the courtesy of listening to them.

20 So, if you would sit down, now, we will  
21 listen to them.

22 MR. MACK: Thank you, Your Honor.

23 MR. VEEDER: I want the objection very clear  
24 here, I want it understood that you are gravely prejudicing  
25 the Confederated Tribe by letting this interloper be here,

1 and I would like to have a ruling --

2 THE COURT: All right, your objection is noted,  
3 it's overruled, and I would appreciate it if you would  
4 sit down and let this gentleman speak.

5 MR. MACK: Thank you, Your Honor.

6 The State does not intend to suggest volumes  
7 of water to be allotted to rights that you are going to  
8 have to determine, but we do believe, most sincerely,  
9 as a party in this case, joined by the United States,  
10 and never dismissed, that there, that Your Honor is being  
11 asked, at least by some of the parties to this proceedings,  
12 in their proposed findings and conclusions, to enter findings  
13 and conclusions that would have serious adverse impacts,  
14 even beyond the No Name Creek Valley, and the Colville  
15 Reservation, and on those two issues we would like to  
16 give our views, and I will try to do that very briefly.

17 Just so you know where I'm going, Your  
18 Honor, one has to do with the so-called replacement fishery  
19 right which the 9th Circuit came up with in its, in its  
20 last and final Opinion, the one under which you are now  
21 working, and the second has to do with the extent of Mr.  
22 Walton's right.

23 Briefly, on the replacement of fishery  
24 right, Your Honor, the United States has asked that the  
25 priority date of that right be fixed as "time immemorial."

1 This is a new argument raised by the United States, as  
2 far as I know, to just, only appearing in the last memoran-  
3 dum filed, signed by both the Justice Department and the  
4 Department of Interior. That proposal would run counter  
5 to specifically what the 9th Circuit found in this case,  
6 the Walton case.

7 Specifically what the 9th Circuit has ruled  
8 in the Kittitas Reclamation District, and specifically  
9 against all western law, the 9th Circuit specifically  
10 found that, to the extent a replacement fishery right  
11 exists, that date of its establishment is the same as  
12 the date of establishment of all of the reserve rights  
13 on the Colville Reservation, namely 1872. In the Kittitas  
14 Reclamation District case the 9th Circuit pointed out,  
15 with regard to the Yakima Nation's fishery interest, and  
16 it's in the very, it's in the third paragraph of the deci-  
17 sion, that that, their, that the Yakima fishery interest  
18 dates back to the day of the creation of the Yakima Reserva-  
19 tion, and it is my understanding, or my office's under-  
20 standing that similar assumptions have been made for all  
21 of the more extensive fishery rights found for Western  
22 Washington tribes, that those rights date from the date  
23 of a treaty creating the reservation, or an Executive  
24 Proclamation.

25 There is simply no foundation for the United

1 States arguing here that the somehow that fishery replace-  
2 ment right preexisted the date of the reservation. It's  
3 important that it not be found to preexist 1872, for a  
4 number of reasons. The 9th Circuit Opinion, as Your Honor  
5 knows, attempts to establish some equitable distribution  
6 of the waters in the No Name Creek Valley. If a right  
7 predates the 1872 date, of course, it would have a greater  
8 priority. Now, rights can be protected, according to  
9 two elements of water law; one is by the priority date,  
10 which is the general ruling in the West, and the other  
11 is by the type of use which is not the ruling in the West,  
12 and is really sort of a riparian law notion adopted under  
13 what is called the English Rule of Riparian Law, and never  
14 been the law in this state, or the other Western states,  
15 so my knowledge. But the United States, in effect, argues  
16 that that rule be adopted, that the use, namely fishery  
17 use, or fishery replacement use, be held to be preeminent  
18 to the other uses, namely irrigation, or whatever else  
19 is made of the use of the waters in the No Name Creek  
20 Valley. And the reason it would be preeminent is because  
21 it would have an earlier priority date, and as Your Honor  
22 is aware, the priority date system is the important system  
23 in the Western states; it establishes the basic precedence  
24 of rights.

25 What is this replacement fishery right.

1 Well, it is a right, apparently, although the 9th Circuit  
2 doesn't give us much indication on this, which was  
3 established in 1872, somewhere in the 1930's was moved  
4 from Kettle Falls, or wherever it was exercised, and held  
5 in suspension, and continues to be held in suspension  
6 until the Tribe decides it wants to place it in a certain  
7 area, where it could possibly be moved again to another  
8 area. The 9th Circuit has determined that this replace-  
9 ment fishery right, or at least part of it, has been moved  
10 by the Tribe somewhere since the 1930's, damming up the  
11 Columbia, period, and somewhere in the late 1960's it  
12 alighted in the No Name Creek Valley.

13 If the United States and the Tribe are  
14 correct about the nature of that right, when it was placed  
15 at the mouth of the creek in the No Name Creek Valley,  
16 in the 1970's, it would have effectively extinguished  
17 in the low flow period the rights of any irrigators, Indian  
18 or non-Indian, in No Name Creek Valley. Assume, Your  
19 Honor, that all the allotments in the valley were irrigated  
20 by Indians, starting in the 1920's, or 1910's. If the  
21 United States is correct, their rights in low flow period  
22 would be completely extinguished by the movement of this  
23 replacement fishery right, which would have an earlier  
24 priority date.

25 THE COURT: Well, what you're saying is, there



1 are, well, let me ask counsel a question; insofar as this  
2 decision is concerned, and the priority of the fishing  
3 right, wouldn't the Circuit in its opinion recognize --  
4 does -- is there any difference between the parties in  
5 this case as to whether that right is vested as of the  
6 date the reservation was created, or some earlier date;  
7 the 9th Circuit said it was created, or existed --

8 MR. MACK: Yes, apparently the United States  
9 has read that differently, Your Honor.

10 THE COURT: I see.

11 MR. MACK: And maybe counsel can explain that  
12 later, but --

13 THE COURT: All right.

14 MR. MACK: -- which maybe they have another  
15 version of the decision, but the version we have indicates  
16 that these are all reserved rights, and that is important,  
17 Your Honor, for the final point I will make in this issue,  
18 because as Your Honor has understood, in, if there is  
19 a continuing jurisdiction here, in low flow periods, in  
20 the valley, and if there has to be reductions, the 9th  
21 Circuit opinion, and I think it can be fairly stated, is,  
22 is founded on the notion that there should be some pro-  
23 ratable reduction of reserved rights, and Your Honor has  
24 understood that throughout.

25 If the replacement fishery right is improperly

1 described, in Your Honor's opinion, it would upset that,  
2 that scheme completely, and you would not have a proratable  
3 share, so it is argued that if there is going to be any  
4 reduction, the replacement fishery right would have to  
5 share some proratable way with the existing irrigation  
6 rights, whether non-Indian or Indian, in the valley.

7 And there is a state law analogous to this, when a right  
8 is, when a place of use, or point of diversion is changed  
9 in a state right, and this is true, in all of the Western  
10 states, as far as I know, it can retain an earlier priority  
11 date, but only if it does not adversely affect the existing  
12 rights in the new site, and if the United States' argument  
13 is bought here, it would allow this replacement fishery  
14 right to be transported, I suppose, around the reservation,  
15 and adversely affect existing rights, Indian and non-  
16 Indian, established in nonirrigable lands, for example,  
17 and we just don't, we just don't understand that.

18           The second -- the second point I would  
19 like to make has to do with an issue that really is a  
20 state law issue, whether all of the counsel in this room  
21 would want to acknowledge that or not, and that is this  
22 whole question of reasonable diligence, and due diligence,  
23 and the terms, the 9th Circuit used the term reasonable  
24 diligence. A lost of cases report, reported used the  
25 term due diligence. They are understood, I think, to

1 be, to be comparable. It is not unusual, in this area  
2 of the law, for a federal court to look to the state law  
3 for leader, for guidance on this. In fact, that is what  
4 Judge Swallenback (phonetic), later to be Labor Secretary,  
5 in the Big Bend Transit case, he looked to state law on  
6 the question of reasonable due diligence. In fact, he  
7 had no choice. This Court has no choice, there is no  
8 federal law on that matter, except federal common law,  
9 which borrows from the state law, state territorial law.  
10 And in that respect, the state understandings, and no  
11 just Washington, but the other western states, that this  
12 concept are crucial to what, to what this Court has to  
13 do.

14 I might add there are similar concepts  
15 established in Washington State statute for relinquishments  
16 in Chapter 90.14 R.C.W. There are discussions of the  
17 factors which go into take, and which have to be taken  
18 into account as to whether an appropriator has properly  
19 continued to make appropriations of water, and there are  
20 just a few points in this area and then I will sit down,  
21 that I would like to make, Your Honor.

22 One is that the law is clear that the appli-  
23 cation of the due diligence standard, is case specific,  
24 it depends on the particular facts of each case. What  
25 does that mean? That means, really, two things; one is

1 that the fact finder, the District Court, Your Honor in  
2 this case, has considerable discretion under the law in  
3 weighing all of the variety of factors which go into reason-  
4 able diligence. Any court in western states water law,  
5 either federal or state court has this considerable dis-  
6 cretion, because of the great variety of factors, and  
7 because those factors must be weighed not only against  
8 the law, but against the particular facts and the particular  
9 case.

10 And the second implication is that, is  
11 that of the variety of factors, and I would just like  
12 to mention a few of them, and then complete this, Your  
13 Honor.

14 All of the factors that you will find in  
15 court discussions of reasonable diligence tests have really  
16 two basic elements. One is that the appropriator has  
17 shown good faith in continuing to perfect his appropria-  
18 tions, and the second, which is also important, is that  
19 if the appropriator was inhibited or deterred from perfect-  
20 ing his appropriations, was the inhibition or the deterrence  
21 created by circumstances beyond his control. If so, he  
22 is not to be penalized for delay in the appropriation.

23 Some of the relevant factors in western  
24 water law, in the law of this state, that would be relevant  
25 to the facts as the State has read them in the record

1 in this case, would be, would be the following, I would  
2 submit. One is the dates on which water was first used  
3 by the non-Indians in the No Name Creek Valley. The record  
4 indicates that the properties first passed out of Indian  
5 ownership in the mid-1920's, early in mid-1920's, and  
6 that Mr. Walton came on the property in the late 1940's.  
7 I will explain later why those dates are important.

8 Second, there are circumstances in this  
9 valley that are of importance, and that the record supports.  
10 One is, the general Depression, not only across the country,  
11 known as the Great Depression, but the depression in the  
12 agricultural industry, in all of the West, which actually  
13 predated the onset of the Great Depression to the stock,  
14 the stock market crash. There is evidence in this record,  
15 Mr. Hampson talked about it, about the general economic  
16 depression in the agriculture industry.

17 Now, the usual rule on reasonable diligence  
18 is that if an appropriator said look, I couldn't appropriate  
19 that water a year after I got my permit, or the year after  
20 I moved on the property, and the reason is because the  
21 bank wouldn't give me the money, I just had troubles.  
22 If the bank wouldn't give them the money because the appro-  
23 priator himself was in bad financial situation, normally  
24 that doesn't wash with the courts, that doesn't get him  
25 anywhere, but where there is general economic problems,

1 courts will look to that, as a factor beyond the control  
2 of the appropriator, limiting his ability to perfect the  
3 right, and there is no question but in all of North Central  
4 Washington, and there is evidence specifically for this  
5 valley, for this county, that the general economic  
6 depression which began in the late 1920's, middle and  
7 late 1920's, added adverse affects, and I might add, con-  
8 tinued into the 1930's.

9 In other words, it began shortly after  
10 these properties came out of Indian ownership, and it  
11 continued for about a decade and a half.

12 Along with that, Your Honor, there is evi-  
13 dence in the record, and it is relevant, and it is the  
14 sort of thing courts look at in applying reasonable dili-  
15 gence, on climatic conditions in this area, and I would  
16 point Your Honor to the evidence about the drought conditions  
17 in North Central Washington, and in this area, beginning  
18 in the late 1920's and continuing through the 1930's.

19 It is, at least for those of us raised in this state,  
20 common knowledge, but there is also evidence in the record  
21 on that, and Mr. Price has pointed to the weather data,  
22 which confirmed this. This resulted in a number of things.  
23 Number one, low or absolutely non-existent surface water  
24 flows in parts of North Central Washington; that is an  
25 immediate effect; and a lagged effect of diminished ground

1 water availability, and when I saw lagged, lagged by a  
2 matter of months and years, so that the drought conditions  
3 immediately adversely affected surface waters, and we  
4 can assume the No Name Creek Valley, after a year or two,  
5 adversely affected ground water conditions.

6 This also is relevant because this occurred  
7 in the 1920's and 1930's, and I, also, then there is evi-  
8 dence in the record, this second phase of this hearing,  
9 besides drought, oversupply or water can adversely affect  
10 an appropriator's ability to appropriate, and as is common  
11 knowledge, and is, as there is evidence in the record,  
12 the 1948 severe flooding, including in this area, including  
13 this area, adversely affected water delivery systems and  
14 the ability of people to appropriate water.

15 The final important factor, Your Honor,  
16 is the, are the conditions created in the early and mid-  
17 1940's by World War II. There are a lot of reported cases,  
18 not many in this state, if any, but a lot of cases in  
19 the West, which look to war conditions as, as the type  
20 of factor which runs in favor of an appropriator who is  
21 late in making his appropriations, and there is no question  
22 but that the period of the early and mid-1940's was a  
23 period which inhibited and deterred a great number of  
24 people from proceeding, although they wished to do so,  
25 in good faith, the appropriation of waters.

1 All of those taken together, Your Honor,  
2 are factors in determining what a period of reasonable  
3 diligence is. In some cases it may be a matter of a year  
4 or two. Under the State permit scheme, normally it's  
5 three years, but it can also be extended to decades under  
6 the State permit scheme, some permittees have been allowed  
7 decades to appropriate their water right because of just  
8 these sorts of factors, and there have been court cases  
9 which have allowed it.

10 Before I, before I finish, I will add one  
11 final note, and that is that there has been some question  
12 about the four acre foot figure, and Mr. Price has referred  
13 to some evidence. The exhibit he was referring to, which  
14 is a circular by the Washington State University, and  
15 I recall it being placed in the record by one of the parties  
16 adverse to us, because I can recall cross-examining this  
17 witness on it, has Exhibit No. 36-2. It does refer to  
18 water duties, and there was testimony from that document  
19 on appropriate water duties, and I believe it was admitted  
20 in evidence.

21 So, in conclusion, Your Honor, the State's  
22 primary interest here is, with due respect to the Court,  
23 and, with greatest respect for the Court, that the Court  
24 not be misled by some of the arguments, filed, and memoran-  
25 dums with the court, and some proposed findings into making



1 rulings on primarily these two issues, reasonable diligence,  
2 and replacement fishing rights, that would have, we consider,  
3 serious and adverse affects even beyond this reservation.

4 Thank you, Your Honor.

5 THE COURT: All right, thank you, Counsel.  
6 I think maybe we're going to have to give Mr. Lenhart  
7 time to rest his hands, so we will take about ten minutes.

8 THE BAILIFF: Please rise; --

9 (A recess taken at this  
10 time.)  
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1           MR. MACK: Your Honor, if I might add just two  
2 sentences.

3           THE COURT: All right.

4           MR. MACK: It has to do with the transferability  
5 of the right of appellee to a non-Indian. The argument  
6 of the United States, as I understand it, and the papers  
7 they have filed, is that unless the water rights are  
8 expressly stated in the documents, involved in the transfer,  
9 that somehow the water rights are not transferred. We  
10 would suggest that the, number one, that is contrary to  
11 all other notions in the Western Washington law, that  
12 the water right being a property right, is transferred,  
13 unless there is express reservation of it in the document,  
14 and the evidence here is that there was never an express  
15 reservation of the water rights, and the documents indicate  
16 transfer.

17                       We would also point out that the, that  
18 argument of the United States here is contrary to the  
19 underlying basis and notions in the Winters case, and  
20 similar cases, where the idea was adopted that there,  
21 that water being necessary for irrigation of western lands,  
22 that there is necessarily the implication of the existence  
23 of water rights in these lands, and since there has been  
24 no express reservation in any of the transfers, we would  
25 argue that in fact whatever rights did exist, reserve

1 rights were transferred out.

2 Thank you, Your Honor.

3 THE COURT: All right, thank you, Counsel.

4 Mr. Veeder, or Mr. Sweeney, which one of  
5 you --

6 MR. SWEENEY: I guess it's my --

7 MR. VEEDER: Your Honor, I would like to ask  
8 a question.

9 THE COURT: All right.

10 MR. VEEDER: Was the Court notified that Mr.  
11 Mack for the State of Washington was going to be here  
12 today?

13 THE COURT: I wasn't notified, although they  
14 are still technically part of the lawsuit.

15 MR. VEEDER: I believe that this has been an  
16 outrage, and I want the record to show it.

17 THE COURT: All right.

18 MR. PRICE: Your Honor, . . .

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2 THE COURT: All right, Mr. Price. You didn't  
3 get to say much.

4 MR. PRICE: Thank you, Your Honor.

5 The Circuit not only said otherwise, the  
6 Circuit specifically said why it said otherwise. The  
7 District Court, quoting on page 2635, the District Court's  
8 holding that an Indian allottee may convey only a right  
9 to the water which he or she has actually appropriated  
10 (reading inaudibly) of actual appropriation reduces the  
11 value of the allottee's right to reserve water. We think  
12 this type of restriction, or transferability is a, can't  
13 say the word, diminution of Indian rights that must be  
14 supported by a clear inference of Congressional intent.  
15 The 9th Circuit took just the opposite tack from Mr. Veeder  
16 and said unless Congress indicated it wanted to deprive  
17 the allottee, it had to say so, it didn't say that, there-  
18 fore the allottee gets his right and he may be transferred.  
19 The 9th Circuit has spoken to that, and specifically  
20 addressed that question. I think we have to abide by  
21 it.

22 Mr. Veeder says nothing before us or in  
23 the record tells us that the fishery amount is to be ratably  
24 apportioned. I may be seeing things in the opinion, but  
25 again, I quote, from page 2633 regarding the fishery,

1 the measurement used --

2 MR. VEEDER: What, what are you looking at?

3 MR. PRICE: The 9th Circuit decision, Mr. Veeder,  
4 page 2633, "The measurement used in defining the magnitude  
5 of the water rights is the amount of water necessary for  
6 agriculture and related purposes . . ." The 9th Circuit  
7 has taken the position the fishery is a related purpose  
8 for the creation of this reservation, it talks about the  
9 amount of water necessary, and then, you read that in  
10 conjunction with page 2636, where the 9th Circuit held  
11 that Ahtanum, a case in which Mr. Veeder was instrumental  
12 in, instrumentally involved, and in which the 9th Circuit  
13 wants to hold for different purposes than he does, "Ahtanum  
14 held that non-Indian purchasers of allotted lands are  
15 entitled to participate ratably," they quote participate  
16 ratably, "with Indian allottees in the use of reserved  
17 water." They did not say in use of irrigation water.  
18 They said they participate ratably in the use of reserved  
19 water. Waters were reserved for this reservation for  
20 agricultural, agricultural and replacement fishery,  
21 according to the 9th Circuit, we have to abide by that,  
22 the fishery will be prorated the same as any other water.

23 Taking you back to page 2633 of the 9th  
24 Circuit decision now --

25 MR. VEEDER: If Your Honor can follow the slip

1 opinion -- I can't.

2 MR. PRICE: Counsel, I didn't interrupt your  
3 argument, even though it was --

4 THE COURT: I don't have it in front of me anyway.

5 MR. PRICE: At page 2633, Your Honor, and speaking  
6 to the fishery issue, we, I agree, must follow the 9th  
7 Circuit; the 9th Circuit said we can quantify the water  
8 right, but it said we are still entitled to find the amount  
9 that is sufficient, and the amount that is necessary in  
10 order to meet that reserve purpose. This case, replacement  
11 fishery. And at the bottom of page 2633, I quote, same  
12 language, "The measurement used in defining the magnitude  
13 of the water rights is the amount of water necessary for  
14 agriculture and related purposes. . ." Necessary. The  
15 record establishes the fishery is not necessary in order  
16 to establish or maintain the propagation of an endangered  
17 species. I think an appropriate interpretation within  
18 this Court's jurisdiction is to find that yes, they do  
19 have a water right to that extent that it's necessary,  
20 and if someday it becomes necessary, then yes, they may  
21 exercise it and it could be used to calculate their pro-  
22 rata portion. Until it becomes necessary, as established  
23 by the 9th Circuit, it may not be used to calculate the  
24 prorata share.

25 Mr. Veeder says that there is no case that

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1 says 25, over a period of 25 years would substantiate  
2 a reasonable diligence, or reasonable diligence in the  
3 appropriation of water. The Big Bend case specifically  
4 cites In Re Alcoa Creek, 129 Washington 9, a 1924 case,  
5 I would like to quote briefly from page 5 of our memorandum  
6 of authorities. In Alcoa Creek, one of the key questions  
7 is whether preferential water rights where certain of  
8 the parties would be limited to irrigation of only the  
9 12 original acres of land put to irrigation, or whether  
10 the preferential right would extend to nearly 340 acres  
11 subsequently developed between 1877 and 1908, a 31-year  
12 period. In ruling in favor of the expanded claim on the  
13 basis of due diligence having been exhibited and developing  
14 a water right, the court held, "The doctrine of common  
15 sense applies in making the appropriation (reading  
16 inaudibly) is an important factor. All the appropriated  
17 water need not be used at once. Reasonable diligence  
18 in making beneficial use is all that is required." We  
19 go on to quote from that case, they're setting out the  
20 factors that could be considered, such as the lands in  
21 question are sparsely settled, located from any trade  
22 center, the creek is small, water is sufficient for all  
23 purposes, area is developed slowly, but all, under all  
24 of these adverse conditions, some irrigation has been  
25 carried on from an early date by means of the Houser Ditch.

1 Almost an identical factual pattern in the Walton case.

2 The law, as I understand it, by the 9th  
3 Circuit, weighs in favor of a ruling in favor of due dili-  
4 gence for the Waltons, through their predecessors, in  
5 their own use.

6 With respect to Mr. Veeder's wanting to  
7 zero in on 55-acre statement by Mr. Wilson Walton, he  
8 still does not recognize and refuses to recognize that  
9 Mr. Walton was talking 55, the same acreage that he talked  
10 about as 65 acres, in the 1982 trial. A difference of  
11 10 acres, I can't explain that, whether somebody can be  
12 10 acres off or on, in five years difference, I don't  
13 know. I recognize that the Tribe has increased their  
14 fishery claim over 100 acre feet of water from the 1978  
15 claim of 220 or 30-some, now to 360. I see no reason  
16 for me to allege that they are purging themselves or any-  
17 thing else. They found that apparently was appropriate  
18 for testimony at the later hearing and they put it on.

19 In any event, Mr. Walton, Wilson Walton,  
20 that is why I thought it was important that Your Honor  
21 have the opportunity to view him personally, and his testi-  
22 mony, so that you could judge for yourself his credibility,  
23 indicated that 65 acres was the part he was putting under  
24 sprinkler irrigation, and that Mr. Veeder refused to recog-  
25 nize that there was an additional 90 acres that was being



1 flood irrigated from time to time, both through surface  
2 flows of the creek diversions, and surface flows from  
3 beaver dams and springs occurring on the property. The  
4 155 acres is substantiated.

5 Mr. Veeder's claim of a change of use in  
6 1965 because of a well, I find nonpersuasive, it's the  
7 amount of land that is under irrigation, not how you obtain  
8 the water. As the, Mr., both Waltons testified, this  
9 streamflow in No Name Creek decreased from a period of  
10 time that they purchased the property, as years went by,  
11 and as the streamflow decreased, they found it appropriate  
12 to go to ground water; the same water, it's all the same  
13 water, and the same aquifer, whether it's underground  
14 or whether it's forced to the surface and springs to generate  
15 the No Name Creek, we're talking about all the same aquifer  
16 water. Obviously their change of use does not detract  
17 from their right, it's the amount of irri-, acreage they  
18 had under irrigation that is appropriate in quantifying  
19 the water rights in this case.

20 An issue which has not been addressed orally  
21 at this point, and it's one that I want to make clear,  
22 is that Exhibit WWWW, or four W's, the Soil Conservation  
23 survey, at the first 1982 hearing we asked that it be  
24 admitted for the purposes of showing that it was a document  
25 that Mr. Walton had carried through on some activity or

1 action. As a result of the testimony of both Mr. Blomdahl  
2 and Mr. Bennett, to the accuracy of the document, the  
3 fact that it represented an accurate representation of  
4 official United States document, we are opposed, and did  
5 not intend to have that exhibit limited to any purpose,  
6 it should be admitted for all purposes, and there is sub-  
7 stantiation in its identification for that.

8 In terms of whether or not this Court should  
9 utilize and rely on the four acre foot water duty figure,  
10 I think it's important for the Court to recognize, as  
11 I had to learn and recognize from the testimony of the  
12 witness of the first trial, water duty relates to the  
13 need of the water by the crop; doesn't have anything to  
14 do with the land. Land doesn't need water; crops need  
15 water. In order to grow an alfalfa and pasture crops  
16 in No Name Creek Valley, Judge Neill found that it took  
17 four acre feet of water to grow that crop. The crop is  
18 the same crop whether it's on Allotment 526, 892, Tribal  
19 allotments or Walton allotments, it's the same alfalfa  
20 crop, it is appropriate for this Court to accept that  
21 figure, if it's good for crop on the Indian lands, it  
22 is the same crop on the Walton land, and they're entitled,  
23 and this Court should have confidence in that figure.  
24 And I should point out candidly, that we argued to this  
25 Court, to Judge Neill, that that figure was high, because

1 Mr. Walton is a better irrigator, he is a better conserva-  
2 tive of water, and he can, and we put on evidence, utilize  
3 water and grow an alfalfa crop with 3.5 acre feet of water  
4 in that same No Name Creek Valley. That was not accepted  
5 by the Court. The Court went to four acre feet based  
6 on testimony of the Tribe that more water was necessary  
7 because of the arid region and dryness of the area. We  
8 still maintain the 3.5 acre feet would work, but in terms  
9 of what the Court has adopted, what is good for their  
10 alfalfa crop is good for our alfalfa crop, and in terms  
11 of comparing acreages ratably, we would have to use the  
12 same figure.

13 I, at the start of this case, wanted to  
14 maintain to this Court, and I wanted to convince myself  
15 that this was a tremendously important case, probably  
16 the most important issue remaining unresolved in Indian  
17 law. That, I have seen the light of day, is not the case.  
18 My client has maintained to me throughout that, "Dick,  
19 if you lawyers would go home and if the Court would just  
20 go away, you know good and well the Tribe and the allottees  
21 and I would be out there irrigating just fine, getting  
22 along just fine, and we will. When this case is over,  
23 the lawyers go home with their money, the Court will get  
24 out of it, go on to other cases," he says, "you know,  
25 we will be out there irrigating and farming and nobody

1 will worry about this anymore and we will get along, we  
2 will exist, just like we did before."

3 THE COURT: Anyone want to so move?

4 MR. PRICE: And in truth, that will happen.  
5 I don't think Your Honor has to sweat blood that somehow  
6 what you pen on the paper is going to be so important  
7 that it's going to shake the earth, or change mankind.

8 THE COURT: I don't know that I attach that  
9 much significance to the Court at this level.

10 MR. PRICE: I think what Your Honor's pen can  
11 do is establish some quantities, identify some quantities  
12 for both parties, that those parties will have to go out  
13 and live with, they will be sustained on appeal or modified  
14 to a certain extent, the parties will live with it, with  
15 the amounts they get, and they will act accordingly, so  
16 I, the reason I want to raise that, is, I, I don't think  
17 this is the issue of all issues in Indian law. I think  
18 it's, may come down to just a straightforward issue of  
19 what was practicable for a farmer to do at that time,  
20 in that era, what was done, what is an appropriate irrigable  
21 acreage for both of the respective parties, and let it  
22 go at that.

23 THE COURT: Well, I do think what I have to  
24 do, Mr. Price, is, is not to just do something without  
25 a great deal of thought, and just pass the buck to the

1 Circuit, I think I have the obligation to do, as within  
2 my ability, to resolve the legal and factual questions  
3 here, and to delineate my reasons so that at least the  
4 Circuit, whatever they do with it, can say, well, this  
5 is what he did, and free to criticize as they see fit,  
6 or modify it, or reverse it, or affirm it.

7 MR. PRICE: I agree.

8 THE COURT: Let me ask you one question.

9 MR. PRICE: (Inaudible.)

10 THE COURT: Would you like to respond to Mr.  
11 Veeder's position with respect to the alleged saturated  
12 lands as being included as irrigable acres?

13 MR. PRICE: Yes, I made a notation of that and  
14 forgot to speak to it, and I thought it was important  
15 that Mr. Veeder said that even though he maybe wasn't  
16 enamored with our witness, Mr. Blomdahl, but that he did  
17 put stock in the fact that you don't irrigate land that  
18 is under water, that is waterlogged, and I think that  
19 is important, because Mr. Blomdahl was a representative  
20 of the agency which performed the study as to the number  
21 of irrigable acres on Walton's land, and if you accept  
22 Mr. Blomdahl's testimony, as Mr. Veeder does, that means  
23 that the Soil Conservation Service does not classify water-  
24 logged lands as irrigable lands. As you will note in  
25 Exhibit WWWW, that in fact they segregated out of the

1 total 360 acres 175 acres which were not appropriate for  
2 irrigation, and it was within those lands, we assume,  
3 would have been alkaline lands, waterlogged lands, soil  
4 types that were not appropriate, whatever; they did find  
5 185 acres that were suitable. If the Waltons were to  
6 claim lands that were subirrigated on their property,  
7 we would be claiming a total of 180, not 175. So I think  
8 the record is very well documented that even though there  
9 are some lands that because they are waterlogged or not  
10 appropriate, those are not included within our claim of  
11 irrigable acreage, and that's substantiated by the Bureau  
12 of Indian Affairs study also that found 170 acres of land  
13 were irrigable, and I'm assuming that the Bureau of Indian  
14 Affairs, like the Soil Conservation study, does not include  
15 lands that have standing water or waterlogged as irrigable  
16 acreage.

17 THE COURT: All right, thank you, Mr. Price.

18 MR. PRICE: Thank you.

19 THE COURT: Mr. Sweeney, anything further from  
20 the government?

21 MR. SWEENEY: No, Your Honor.

22 THE COURT: Mr. Veeder, any comments you wish  
23 to make?

24 MR. VEEDER: I have this, Your Honor, I make  
25 it in the form of a motion.

1 THE COURT: All right.

2 MR. VEEDER: I move this Court, because it's  
3 being misled, to have an on-the-ground inspection and  
4 investigation of the lands claimed to be irrigable and  
5 irrigated by the Defendant Waltons. I petition this Court  
6 to go with us up on the Walton property and eyewitness  
7 it yourself in regard to the saturated character of the  
8 land that is called irrigable.

9 THE COURT: You think that would be safe with  
10 you people together out there?

11 MR. VEEDER: What?

12 THE COURT: I was kidding.

13 MR. VEEDER: I didn't hear.

14 THE COURT: I say you think I would be safe  
15 with you people out there?

16 MR. VEEDER: You certainly would, I'd see you  
17 were taken care of. What I'm saying is that justice cries  
18 out, now, after the last statement by Counsel, that you  
19 go on the land, and we will take you, personally, on wet  
20 land that is called irrigable, and justice cries out that  
21 you look at it yourself, and I will, I will come across  
22 the country any way, any moment you say you can go up  
23 there. I petition this Court to do that. I want you  
24 to see it.

25 THE COURT: What do you gentlemen say to that?

1           MR. SWEENEY: I have no objection, the government,  
2 as everyone else has seen the property, I guess, I think  
3 it might be helpful for you to look at it.

4           THE COURT: What do you think, Mr. Price?

5           MR. PRICE: It might depend on the time of year,  
6 we have no objection, in terms --

7           MR. VEEDER: Why not --

8           MR. PRICE: Mr. Veeder --

9           MR. VEEDER: -- now?

10          MR. PRICE: -- I don't have to respond to you.

11          THE COURT: Okay, Mr. Lenhart can only write  
12 down what one of you say at a time. Go ahead.

13          MR. PRICE: I think the, I don't know how much  
14 help it will be to the Court in terms of the state of  
15 the record upon which we have to go up on appeal, Your  
16 Honor. The testimony of Mr. Blomdahl and Mr. Bennett  
17 as to the acreages involved were based on on-site inspection  
18 by their personnel, the Bureau of Indian Affairs study  
19 was done by on-site inspection of their personnel. Those  
20 are the facts we have to rely upon in this regard, and  
21 I don't know that your -- looking at what lands or what  
22 lands they classify or didn't classify will assist this  
23 Court in supplementing this record.

24          THE COURT: Well, normally going to look at  
25 the property or whatever is involved in litigation is



1 normally done for the purpose of being better able to  
2 understand the testimony of the witnesses, and get oriented,  
3 so that the trial flows smoothly, but I will give that  
4 some thought.

5 MR. VEEDER: Let me put this one more thought  
6 in. They're confusing "irrigable lands," say, with lands  
7 that need to have water rights adjudicated on it, and  
8 if you will go out, I will assure Your Honor you will  
9 see land that is waterlogged today that they're, for which  
10 they're claiming four acre feet of water, and I think  
11 you should do it, I think justice is the thing that is  
12 to be accomplished there.

13 THE COURT: Well, that's the bottom line, I  
14 think. The question we always have, people have different  
15 ideas of what justice is. Well, I will give that some  
16 thought, Mr. Veeder, and if it's done, it will be done  
17 at a time --

18 MR. VEEDER: It's not too late in the year.  
19 In fact, it's very much to their advantage at this time.

20 THE COURT: I have to look at my own time, it  
21 gets a little tight around the edges sometimes. Let's  
22 see, what would it take to drive up there and look at  
23 it.

24 MR. PRICE: Takes three hours, three hours to  
25 get to Omak, Your Honor.

1                   MR. VEEDER: You can get up there and back in  
2 a day.

3                   MR. PRICE: Your Honor, what we, while you're  
4 considering that, we've got concerns about the Tribe,  
5 or Mr. Veeder or their experts being along to point out  
6 their views on it. If Your Honor wants to look at it,  
7 we have no objection to you going on there, with whomever  
8 you want. If you want to select a master, or somebody,  
9 that is perfectly acceptable, but --

10                  THE COURT: Well, the previous water master  
11 probably has a pretty good grasp on it.

12                  MR. PRICE: Well, the previous water master  
13 was threatened off the land by Mr. Veeder.

14                  MR. VEEDER: Oh, that is a consummate lie, and  
15 he should be ashamed that he would stand here like a damn  
16 liar.

17                  THE COURT: Uh, uh, let's not get into that.

18                  MR. VEEDER: That is a consummate damned lie.

19                  MR. PRICE: I have an affidavit, Mr. Veeder.

20                  THE COURT: All right, gentlemen, I guess that's  
21 the argument. I don't particularly relish the task of  
22 having to try to resolve this problem, but I guess that  
23 is what we're here for, so I will do it, and I will let  
24 you know whether I think there is something to be gained  
25 by going up to the property, and if so, how it would be

1 done. If you want an opportunity, Mr. Veeder, to respond  
2 to the comments of the State, you can do that. I would  
3 keep it brief. I don't know that there is anything sig-  
4 nificantly new -- largely the argument that Mr. Price  
5 has made.

6 MR. VEEDER: I will have Len run it off as fast  
7 as he can, and I will --

8 THE COURT: All right.

9 MR. SWEENEY: Does that apply to the government,  
10 too?

11 THE COURT: If you like.

12 I don't know if it's going to mean a great  
13 deal, but if it will make you feel better, at least we  
14 can do that. Okay?

15 THE BAILIFF: Please rise; --

16 THE COURT: Thank you.

17 MR. PRICE: Thank you, Your Honor.

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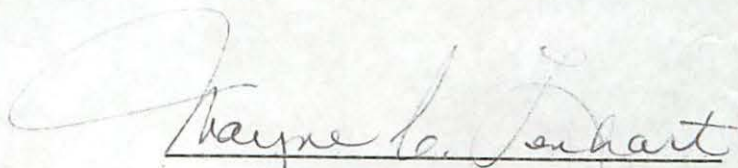
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C E R T I F I C A T E

I do hereby certify that the foregoing  
is a true and correct transcript of my notes taken in  
the entitled proceeding and on the date stated.

I further certify that the transcript was  
prepared by me or under my direction.



WAYNE C. LENHART  
Official Court Reporter